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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 36

LOUISIANA PUBLIC SERVICE COMMISSION, ETC., ET AL., APPELLANTS,

vs.

THE TEXAS & NEW ORLEANS RAILROAD COMPANY, ARKANSAS, LOUISIANA & MISSOURI RAILWAY COMPANY, ET AL.

No. 37

STATE OF LOUISIANA AND LOUISIANA PUBLIC SERVICE COMMISSION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

REPLY BRIEF FOR APPELLANTS.

PERCY SAINT,
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LEWIS L. MORGAN,
Chief Counsel, Louisiana Highway Commission;

MICHEL PROVOSTY,
City Attorney, City of New Orleans;

WYLIE M. BARROW,
Special Counsel, Louisiana Highway Commission, and Special Assistant to the Attorney General of Louisiana,

Solicitors for Appellants.

OCTOBER 12, 1931.

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REPLY TO GOVERNMENT'S BRIEF.

After stating the case, the Government argues that:

(1) The order of the Interstate Commerce Commission is valid.

(2) The order prescribing the minimum river crossing allowance is valid, because the Commission made a full investigation of rates on sand, gravel etc., in the territory covered by its orders.

All three of these arguments are refuted by appellants.

Under the first subject the Government's argument is made upon the assumption that the Commission in its *Hoch-Smith* investigation complied with Section 15*a* of the Interstate Commerce Act.

It seems to be admitted by the Solicitor General that a compliance with the provisions of Section 15*a* is essential before the Commission can by a direct order prescribe intrastate rates.

On page 19 of the brief it is stated:

> "The Commission inquired into and made findings of the volume and nature of the traffic, the carriers' revenues therefrom, the extent and the character of consumer demand, and the sources of supply, the interstate and intrastate rate structure, both in the southwest and in other regions and the similarity of transportation conditions throughout the southwest."

We find nothing in the Commission's report as to the carriers' revenues from the traffic in question, except the amount of freight charges paid in the various States of Arkansas, Texas, and western Louisiana. The amount of freight charges paid in the State of Oklahoma and in southern Missouri were not referred to in the report.

There is no finding as to net railway operating income. There is no finding of the revenue needs of the

carriers. We have searched the Commission's order for any reference to the requirements of Section 15a as to the expenditures for maintenance of way, structure, and equipment, annual net railway operating income, fair return, and the aggregate value of the railway property of such carriers held for and used in the service of transportation, and it cannot be found.

The Commission's report and orders were not based upon the needs of the carriers for additional revenues in order to afford them a fair return upon the aggregate value of their railway property, or to "provide the people of the United States with an adequate transportation system." In its discussion under the heading "*The Hoch-Smith Resolution*" (R. 52), the Commission states that:

> "In performing the task assigned to us by the resolution of equitably distributing the burden of transportation charges, having due regard to the natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation, it is evident, as we have had occasion in the past to state, the principle of what the traffic can or will bear is a factor which must be given due consideration."

Under the heading "General Discussion and Conclusions" (R. 53), the Commission states:

> "In short, the record discloses a rate situation affecting the transportation both interstate and intrastate of these commodities throughout the considered territory that needs correction.

What is here needed is a reasonable scale *that will be harmoniously applied* throughout the territory."

The Commission further states under this heading that:

"Consideration of the entire record in these proceedings, however, justifies the conclusion that the interstate level of rates now applying on these commodities throughout the considered territory is somewhat too high and it should be lowered accordingly" (R. 54).

* * * * * * *

"The carriers in submitting their proposal state that they do so with the thought that they would result in reasonable charges on this traffic, and *promote uniformity*. With the exception of the Texas Lines, they assert that *the rates which they propose herein were not arrived at with the thought of securing an increase in revenue*" (R. 55). (Our italics.)

"The carriers' proposed scales are higher than the 9702 scales and undoubtedly would result in a material increase in the carriers' revenue from this traffic if universally applied. The carriers' proposals, considered as a whole, have not been justified" (R. 55).

It is apparent from the entire report of the Commission and its specific findings, 1 to 7, inclusive (R. 56, 57), that the Commission was proceeding upon the theory that its duty under the Hoch-Smith Resolution compelled it to prescribe uniform rates, in a general investigation in which it found that there was a dis-

parity of rates on the commodities in question in the several States and territories under consideration, when complying with the requirements of Section 15a.

The fact that other State commissions agreed to adopt the scale of rates prescribed by the Interstate Commerce Commission does not seem to us to have any particular bearing upon the case, for as was said in the *Wisconsin Case*, 257 U. S. 563, 591,

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

There was no evidence before the Commission and no finding by it to show that the carriers were not earning "an aggregate net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."

In *Ex Parte* 87, *Revenues in Western District*, 113 I. C. C. 17, the Commission found that the aggregate

value of the carriers in the southwestern district, as of December 31, 1924, was $1,511,000,000.00, and the rate of return for 1925 on this value was 6.90 per cent for the southwestern district. It is conclusive, therefore, that the Commission was not proceeding upon any theory that the carriers were in need of additional revenues or that the intrastate rates in western Louisiana had to be raised in order to produce additional revenue for the purpose of paying the return upon the aggregate value of the railway property of the carriers in the southwestern district (which included carriers in western Louisiana) held for and used in the service of transportation. We still insist that there was an absence of evidence before the Commission to justify it in increasing the intrastate rates in western Louisiana, based upon the "dove-tail relationship" of sections 13 (4) and 15a".

If there was any doubt as to the meaning of the decision in the *Wisconsin Case* on this important point, it was clarified by Commission's decision in the *Florida Log Rate Cases*, 282 U. S. 194, where the court makes it clear that before the intrastate rates can be disturbed in order to remove a general discrimination against interstate commerce growing out of the disparity between particular rates on intrastate and interstate traffic, "the justification of the exercise of the Federal power must clearly appear." The court says:

> "If the action of the Commission is not simply for the removal of undue prejudice against interstate commerce, as between persons or localities, and the Commission undertakes to pre-

scribe a state-wide level of intrastate rates, in order to avoid an undue burden, from a revenue standpoint, upon the interstate carrier, there should be appropriate findings upon evidence to support an order directed to that end."

There are no findings by the Commission showing that the revenues of the carriers were in such a condition that an increase in intrastate rates was necessary, in order for them to earn the fair return allowed them by the Commission.

We submit, therefore, that the orders prescribing intrastate rates for western Louisiana do not possess that clearness of purpose and basis of fundamental findings of fact which are required when the Interstate Commerce Commission invades the domain of State power and attempts to regulate intrastate commerce.

Ferry Charges.

Under their second point the Government and the Commission in their brief discuss the ferry charges prescribed by the Commission. We have fully discussed point No. 1 under this head in our original brief which deals with the question of the violation of Article I, section 9, clause 6, of the Constitution, and we believe we have shown without question that the prescribing of ferry charges on traffic to and from the ports of the State of Louisiana when no such charges are applied on traffic to and from the ports of Texas operates as a preference to the ports of the latter State over those of the former.

As to the second point, dealing with the question of

the divisions, the Commission itself proceeded upon the theory that the river crossing charges are divisions of through rates, by fixing a separate charge for this service, which it adds to the line haul rates. The Commission prescribed joint rates (R. 62), and fixed separate ferry charges which formed a part of joint rates, but it did not comply with the provisions of section 15 (6), in fixing the ferry charges which are to all intents and purposes divisions of joint through rates.

In *Baltimore & Ohio R. Co. v. United States*, 277 U. S. 291, 72 L. Ed. 885, the court, through *Mr. Justice Butler*, says:

> "The commission's report states that the question before it was 'whether the east side lines or the west side lines should bear the expense incident to the transfer across the Mississippi River from East St. Louis, Illinois, to St. Louis, Missouri, of practically all carload and less than carload freight originating east of the St. Louis District and the District west thereof.'"

The Commission had proceeded with the case upon the theory that the transfer charge across the Mississippi River at St. Louis was a "practice," and therefore the requirements of Section 15 (6) did not apply. The court disagreed with the Commission, saying that the transfer charges were apportionments or divisions of through rates, and not "practices" under this act, and stated,

> "and this is so whether the revenues are derived from joint rates or from combination through rates."

After a discussion of the handling of the traffic across the river at St. Louis, and the transfer charges which the Commission eliminated by requiring the East St. Louis rates to be extended to St. Louis, the court further says:

> "It results that the controversy before the Commission involved divisions or apportionments of revenues derived from through traffic."
>
> * * * * * * *
>
> "The same considerations apply in determining the reasonableness of the apportionment of revenues derived from combination rates as govern the divisions of joint rates. The merits of the changes made by the order cannot be determined without a consideration of the facts substantially similar to those specified in pp. 6 of Sec. 15 relating to the division of joint rates. The case was not presented by complainants or considered by the Commission on that basis. There was no evidence to show the amount of revenue required to pay operating expenses, taxes and a fair return on the property of appellee lines or that their rates were not adjusted or were not sufficient to cover the transfer charges in question. There was nothing to support a finding that it is or will be unjust or unreasonable for the appellee lines to bear the cost of the westbound through traffic. The order cannot be sustained."

These same principles apply in this case to the ferry transfer charges prescribed by the Commission, as such charges are no more than apportionments or divisions of joint rates which the shippers have to pay,

and in which they have an interest. Made without evidence, they are correctly termed "arbitraries" by the Commission and, having been made without compliance with the provisions of Section 15 (6), are illegal.

The Government's brief does not appear to dispute the fact that there was no evidence before the Commission as to the cost of performing the ferry transfer service, but refers to Docket 9702, *Memphis Southwestern Investigation*, 55 I. C. C. 515, 77 I. C. C. 473, 80 I. C. C. 157, and also *Mileage for Miss. River Crossings*, 90 I. C. C. 462. The government appears to contend that as the Commission fixed certain arbitraries in these cases it was justified in fixing different arbitraries in the present case without evidence to support the same.

So far as this case is concerned, the Commission did not fix the ferry charges in this case based upon the record in No. 9702. This was plainly understood by all parties, and the Commission, in its report, rejects the 9702 scale as well as the carriers proposed scale (R. 27, 31, 35,) and says:

> "The carriers proposed scales are higher than the 9702 scales, and undoubtedly would result in the material increase in the carriers' revenue from this traffic if universally applied. The carriers' proposals considered as a whole, have not been justified" (R. 55).

The Commission then proceeds to fix a lower scale of rates than those prescribed in Docket 9702, but fixes a higher ferry charge than proposed by the carriers, although there was no evidence before the Commis-

sion to justify the fixing of any ferry charge, based upon the cost of the service.

The 9702 scale did not apply on interstate or intrastate traffic between points in western Louisiana under the Commission's order, although it was voluntarily extended by the carriers to include that territory. However, the question of the evidence is all settled by the record and the stipulations of counsel settling the record. The narrative of the evidence is covered by the following stipulation:

> "1. The within and foregoing statement of evidence is a true and correct transcript, in narrative form, of all the oral testimony introduced at the hearings before the Interstate Commerce Commission in the proceedings styled R. A. Gibson *v.* Kansas City Southern Ry. Co. *et al.*, Docket No. 16002, Tennessee-Arkansas Gravel Co. *v.* Missouri Pacific Railroad Co., Docket No. 18702, and Rate Structure Investigation, Part 11, Sand and Gravel, Docket No. 17000, as the same is contained in the official typewritten transcript thereof on file with the Commission, a copy of which, duly certified by the Commission, was offered in evidence in behalf of the petitioners in the District Court in the above entitled cause; and said oral testimony, together with the exhibits referred to therein, was all the evidence offered by any of the parties at the hearings before the Interstate Commerce Commission in the above-entitled proceedings" (R. 841).

And the exhibits are covered by a stipulation which sets forth those which are to be printed; those which are to be filed with the clerk in bound volumes, and

those which are to be sent up to the clerk in original form, and concludes with the following:

> "The above numbered exhibits together with the narrative of the testimony as already stipulated, constitute the evidence before the Interstate Commerce Commission in the above mentioned proceeding, also before the District Court and before the Supreme Court" (R. 1175).

Even were these stipulations not made, the record in 9702 was not material to any issue now raised, because the Commission did not in that case have before it the question whether intrastate rates in western Louisiana discriminated against interstate commerce as a whole in the territory involved in this case.

In its notice of June 13, 1927, initiating a general investigation under the *Hoch-Smith Resolution*, and re-opening the *Memphis Southwestern Investigation*, the Commission stated:

> "No. 9702, Memphis-Southwestern Investigation, and cases consolidated therewith, 77 I. C. C. 473, in which the Commission prescribed rates on these commodities to and between certain points in the Southwest have been reopened for further hearing primarily for the purpose of considering the rates on sand and gravel between Memphis, Tenn., and Arkansas, and between points within that state."

The Commission did not prescribe rates on sand and gravel between points in western Louisiana in No. 9702, nor did it attempt to fix intrastate rates on these commodities between points in western Louisiana, or between points in western Louisiana on the one hand

and points on the east bank of the Mississippi River on the other hand, nor did it fix specific ferry crossing arbitraries on sand and gravel for the Mississippi River transfers and Vicksburg and south, on traffic to and from western Louisiana.

In its order in the present case the Commission first disposes of the *Hoch-Smith Investigation* by saying:

> "It is ordered, That the common carriers by railroad operating as such within or between the States of Arkansas, Oklahoma, Texas, and Louisiana west of the Mississippi River, but including crossings on the east bank of said river, New Orleans, La., to Memphis, Tenn., both inclusive, respondents in No. 17000, Part 11, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 17, 1929, and thereafter to abstain, from publishing, demanding, or collecting, for the interstate transportation of the commodities described in Appendix 1 to the aforesaid report, in straight or mixed carloads, between the points set out in the next two succeeding paragraphs hereof, rates in excess of those prescribed in said paragraphs" (R. 64).

The Commission then refers to the territory and rates covered by its general investigation and later makes a separate and special order as to No. 9702, as follows:

> "It is further ordered, That respondents in No. 9702 and defendants in Nos. 7304, 9227, 10418, 10419, and 7250, named in our orders

heretofore entered therein on February 6, 1923 (77 I. C. C. 473), according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 17, 1929, and thereafter to abstain, from publishing, demanding, or collecting, for the interstate transportation of the commodities described in the next succeeding paragraph hereof between the points therein set forth, rates in excess of those prescribed in said paragraph.

"It is further ordered, That said respondents in No. 9702, and said defendants in Nos. 7304, 9927, 10418, 10419, and 7250, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 17, 1929, upon notice as aforesaid, and thereafter to maintain and apply to the interstate transportation of the commodities described in the following table and from and to the points therein set forth, rates which shall not exceed those set forth in said table:

* * * * * * *

Respondents and defendants in No. 9702 and No. 7304.	*Rates to*
Traffic.	Points in Missouri on and south of the line of St. Louis-San Francisco Railway running from Cape Girardeau, Mo., through Wingo, Mo., to Springfield, Mo., inclusive.
Commodities described in appendix 1, to report, in straight or mixed carloads.	*Rates.*
From.	As set forth in appendix 2 to said report, plus 6 cents per ton of 2,000 pounds.
Memphis, Tenn.	

It appears, therefore, that the Commission dealt with No. 9702 only in so far as it covered the terri-

tory described, and dealt with the general rate situation under No. 17000, Part 11, on the record as made up in that case, and not upon the No. 9702 record, because in that case it fixed a ferry allowance of 20 miles to be added to the mileage rates from New Orleans, only, and there was no evidence in the present case as to the cost of performing the ferry service. The Commission could not, therefore, have fixed the ferry charges on the basis of the 9702 record.

Besides, in *Intrastate Rates within Louisiana*, 164 I. C. C. 600, 617, decided July 1, 1930, the Commission holds that

> "the use in constructing intrastate rates in said western Louisiana on classes and commodities of 20 constructive miles for Mississippi River crossings instead of the specific arbitraries provided for in the construction of interstate rates in *Consolidated Southwestern Cases*, have not been shown to have caused or to cause any undue preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce on the other, or any unjust discrimination against interstate commerce."

Discrimination.

On page 27 of the Government's brief, it is stated:

> "Special attention is directed to the fact that the rates of which appellants complain are lower than the rates which at the time of the hearing the Louisiana Public Service Commission was maintaining on commercial shipments of these commodities."

We do not know what point is intended to be made by this bare statement of an undisputed fact.

The municipal rates in western Louisiana were put into effect voluntarily by the carriers under an agreement with the Louisiana Commission. These rates were the subject of investigation in *Louisiana Rates, Fares, and Charges*, 60 I. C. C. 477 (referred to on pages 125, 128, of our original brief). In that case the Commission fully reviews the history of the Louisiana municipal rates, and says:

> "It is shown for the Louisiana Commission, and conceded by witness for certain respondents, that the municipal rates now in force were the subject of agreement between it and the carriers and that no application for rehearing or for further hearing with respect to these rates was ever made to the Louisiana Commission. It is suggested that the issue here raised with respect to municipal rates is also included in No. 8845, *Natchez Chamber of Commerce v. L. & A. Ry. Co.*, *supra*, which has been reopened, and that it should be disposed of on the more comprehensive record in that proceeding."

In the *Natchez Case*, 63 I. C. C. 297, 298, the Commission disposed of the issue as to alleged unjust discrimination against interstate commerce growing out of the lower municipal rates in western Louisiana as compared with the higher interstate rates applicable from Natchez to destinations in western Louisiana, by saying that:

> "The record does not warrant a finding of undue prejudice to Natchez and preference of

points in Louisiana in connection with rates on sand and gravel for United States, state and municipal governments."

The complete history of the Louisiana municipal rates is related in Exhibit No. A-12 (R. 900-926), which is an excerpt from the record before the Commission in the *Natchez Case*, and which elaborates the finding of the Commission in that case quoted above.

Section 22 of the *Interstate Commerce Act* as amended by the *Transportation Act*, 1920, provides:

> "That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments," etc.

This section of the act was reviewed by the court in *Nashville C. & St. L. R. Co. v. Tennessee*, 262 U. S. 318, 67 L. ed. 999, and was held by the court to be permissive. The court says:

> "The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travel, in the matters recited therein, is not necessarily prohibited.
>
> . . . . . .
>
> "It preserves the right of the carrier, theretofore enjoyed, of granting, in its discretion, preferential treatment to particular classes in certain cases."

The permission thus granted must not, of course, be used to unduly burden interstate commerce.

As to the propriety of the different scales of rates on intrastate traffic in western Louisiana, Judge Jack, in the case of *Bush, Receiver, et al., v. Texas & Pacific Railway Co.*, 209 Fed. 1008, said:

> "It is urged that the discrimination between the two rates is unreasonable and arbitrary, because it is based, not solely on the character of the commodity or its intended use, but is further dependent on whether that State and Parish, under Order 1981, or the municipality, under Order 47, 'obtains the benefit of such rate.' It is evident that the public would obtain the benefit either directly, where the freight was paid by the State, Parish or Municipality, or indirectly by lower prices from the private contractor where he, himself, furnished sand and gravel for the work. The purpose, then, it would seem, of this proviso making the lower rate effective only when the public obtains the benefit thereof, was to make it inapplicable on shipments of sand and gravel to be used in paving under contracts previously made where the contractor was to furnish the material. Of course, it was understood that the State, Parish or Municipality would draft all future contracts so as to obtain the benefit of the rate. Consequently, as a practical proposition, it was safe to assume that, after the adoption of such orders, there would be no such shipments in which the public did not obtain the benefit of the reduced rate, and hence, the only effective condition in the discrimination on the rate was based on the use to which the sand and gravel was put."

The rates referred to by Judge Jack are the Louisiana intrastate rates under discussion in this case.

Reply to Carriers' Brief.

After stating the case and issues the carriers proceed with their argument on the basis that there was a full investigation by the Commission, and that its findings are supported by evidence.

On page 7 of their brief the carriers state that it was "only after the testimony had been taken in the 'complaint and answer cases' that the Commission instituted a general investigation into the rates in question in the four Southwestern States above mentioned, such investigation expressly including the question of intrastate rates within Louisiana. This is followed by a comparison of the Louisiana intrastate rates and those prescribed by the Interstate Commerce Commission. It is pointed out on page nine that the average haul within Louisiana was from 75-80 miles. Reference is made to Article X of the bill of complaint, where it is alleged that if the intrastate rates remained in effect south of the Vicksburg, Shreveport & Pacific the rates will be illegally increased by the sum of more than $100,000.00 annually.

The brief then says:

> "The record is replete with testimony as to the discrimination against producers of sand and gravel situated outside of Louisiana endeavoring to market their products in Louisiana, in competition with Louisiana producers having the benefit of the much lower Louisiana rates."

The only evidence of such producers was from southern Arkansas producers, introduced in the complaint

and answer cases and disposed of by the Commission in its finding No. 5.

The Commission in its report finds (155 I. C. C. 271, R. 45) in its discussion under the complaint and answer cases that the Little River Siding plant was so located that there are few markets in Arkansas near enough to be available, and was built primarily with the view of shipping to points in northern Louisiana, chiefly Shreveport, 117 miles away, and the largest consuming market of this material in that territory.

The Commission further finds (155 I. C. C. 271, R. 47), as to the complainant in No. 17002 that "representative points in northern Louisiana which this complainant claims can be successfully reached from this Arkansas plant under a fair adjustment between interstate and intrastate rates, are Lake Providence, Oak Grove, Tallulah, Mer Rouge, Oak Ridge, Winnsboro, and Bastrop." All these points are on or north of the line of the Vicksburg, Shreveport & Pacific. The Commission finds that, "however, as has been shown, these complainants did, in many instances, successfully compete at northern Louisiana markets when they had available the billing-order rates, although these rates were on a higher level than the Louisiana good-roads rates. We find there are no circumstances or conditions surrounding the transportation from points within western Louisiana warranting a lower level of rates on interstate traffic to such Louisiana markets than such as would be reasonable from the complaining Arkansas points to such destinations."

The Commission afterwards discusses "transportation and traffic conditions", the "Hoch-Smith Resolu-

tion", and, under the topic "General Discussions and Conclusions" makes its findings not only upon the complaint and answer cases, but upon the entire case, and states that this is done "upon consideration of all the evidence, facts, and circumstances of record."

Finding 5 limits the territory within which undue preference of Louisiana producers and undue prejudice to Arkansas producers exists, as shown by the record, to destinations in Louisiana located on and north of the line of the Vicksburg, Shreveport & Pacific Railroad (now part of Illinois Central System), extending from Vicksburg, Miss., to Shreveport, La.

On page 221 of its report, 155 I. C. C., after it had made its findings, the Commission then adds a discussion of intrastate rates, and says:

> "In view of this expression on behalf of the Louisiana Commission, and also the further fact that the intrastate rates within Louisiana covered by a finding No. 5 are embraced with our finding and order hereinafter made in the general case, it is unnecessary at this time to enter a separate order under finding No. 5."

The Commission has limited, on the evidence before it, the territory within western Louisiana within which there was undue preference and undue prejudice against shippers and localities in interstate commerce in favor of those in intrastate commerce and against interstate commerce generally, based on the record.

The carriers' brief admits that in considering a case under Section 13 (4) of the act, consideration should also be given to Section 15*a* of the act, but nowhere in the carriers' brief is it pointed out that the Commis-

sion gave consideration to those specific items which are required to be considered under Section 15*a*. (See pages 106, 118, our brief.)

The carriers rely upon the *Shreveport Case, H. E. & W. T. R. Co. v. United States*, 234 U. S. 342. We have pointed out in our original brief that in the Shreveport case the court held that the Commission did have power to deal with injurious discrimination. There was a complete investigation of the cost of performing the transportation service in the Shreveport case, and, although the order in that case was made under Section 3 (1), of the Act to Regulate Commerce (which is the same as Section 3 (1) of the Interstate Commerce Act), the court was careful to point out that there must be a showing that the undue preference or prejudice exists in the territory within which the Interstate Commerce Commission exercises its powers to increase intrastate rates, in order to remove such discrimination. In the Shreveport case there was a delimiting of the territory by express terms of the Commission's order to that part of Texas where injurious discrimination was found to exist, and, furthermore, the Commission gave the carriers the choice of either reducing the interstate rates or increasing the intrastate rates.

The carriers also refer to the *South Dakota Case, American Ex. Co. v. Caldwell*, 244 U. S. 617. We see nothing of comfort to them in this decision. We have discussed the case on page 72 of our original brief. The order of the Commission in the South Dakota case was upheld only in so far as it extended to rates in the competitive territory within which unjust dis-

crimination was found to exist, and was set aside as to the territory where no unjust discrimination was shown.

The carriers refer to *Ill. Central R. Co. v. State Pub. Util. Com.*, 245 U. S. 493. This case is discussed on page 72 of our original brief. In this case the court again held the power of the Federal Commission to deal with intrastate rates extended only to clear cases of injurious discrimination against interstate shippers and localities, and against interstate traffic.

The carriers discuss the *Wisconsin Case*, 257 U. S. 563, which was based upon the order of the Commission in *Ex parte 74, Increased Rates*, 1920, which order was entered under Section 15*a*, and was for the purpose of increasing the carriers' revenues. We have discussed this case at numerous points in our original brief, and analyzed it on pages 25, 78. In the present case no witness for the carriers claimed that an increase in rates was necessary, and they make no such claim in their brief.

The Commission rejected the carriers' proposed scales saying that they would result in a material increase in the carriers' revenue from this traffic if universally applied (R. 55).

The carriers also refer to the case of *Arkansas Railroad Comm. v. Chicago, R. I. & P. R. Co.*, 274 U. S. 579, which was discused on page 19 of their brief. We have also discussed this case on pages 80, 81 of our original brief. The case is plainly with the appellants in this case, for a reading of the report of the Commission in the present case, leaves no doubt that the discrimination found upon the facts of record both

against shippers and localities and against interstate commerce was confined to northern Louisiana.

The carriers on page 19 of their brief cite *Board of R. Comrs. v. Great Northern R. Co.*, 281 U. S. 412, 74 L. ed. 936. This case has no application to the case at bar. What the court really held in the North Dakota Case was that the courts will not enjoin the enforcement of the order of a State Railroad Commission, prescribing intrastate rates, on the ground that such rates cause undue or unreasonable discrimination against interstate commerce, in violation of section 13 of the Interstate Commerce Act, until the fact of such discrimination has been established in a proceeding before the Interstate Commerce Commission, even though the operation of the injunction sought is limited to the pendency of the investigation undertaken by the Interstate Commerce Commission in conjunction with State Commissions, of the rate structure of all common carriers subject to the Interstate Commerce Act.

In the present case there was no resort to the courts until after the Interstate Commerce Commission had found discrimination to exist in a limited portion of western Louisiana, and the court quite properly took jurisdiction.

As we understand the *North Dakota Case*, it merely holds that the suit to enjoin the intrastate rates was premature.

The *Florida Log Rate Cases*, 282 U. S. 194, were discussed on pages 20-21, of the carriers' brief, and are discussed on various pages, 48, 50, 51, 66, 87, 88, 92, and 117 of our original brief.

There Was No Evidence Before the Commission as to the Cost of Performing the Ferry Service.

The carriers on page 35 of their brief say that they do not understand the attack made on the Commission's order on the ground that there is no finding or reference to evidence by the Commission as to the cost of performing ferry services across the river at Angola, Baton Rouge, Harahan, and New Orleans, La. They then refer to *Mileage for Mississippi River Crossings*, 93 I. C. C. 462. The carriers do not deny that there was no finding by or evidence before the Commission to support the finding upon which they could fix the ferry charges across the Mississippi River for transporting sand and gravel.

No part of the evidence in the *Mississippi River Crossings Case, supra*, was filed in evidence in this case nor was that case reopened and consolidated with this case. An examination of the report shows that no ferry charges were fixed for the transportation of sand and gravel, crushed stone, and shells in that case. All the Commission did was to condemn the 20 mile allowance applicable on interstate traffic and to substitute therefor certain ferry tolls on classes 1, 2, 3, 4, and 5, and A, B, C, D, and E on interstate traffic. There was no finding of undue prejudice to or undue preference of interstate shippers or localities, or discrimination against interstate commerce as a whole. The carriers' brief supports, rather than condemns our argument as to ferry crossings.

Commissioner *McManamy*, dissenting in the crossings case, *supra*, points out that,

"The one mile across the Mississippi River is an integral part of the carriers' main line from points east of the river to points west of the river, and is just as essential in handling traffic as any other mile of main line."

However, the record still stands with no evidence before or finding by the Commission of the cost of transporting sand and gravel across the Mississippi River by ferry service operated as an integral part of the carriers' continuous lines, although the Commission, without evidence and without a full hearing, did fix an arbitrary charge of eight cents per ton or $4.00 per car for this ferry service, whereas, the carriers only proposed six cents per ton or $3.00 per car, but offered no evidence to support the charge.

In Prescribing Intrastate Rates the Commission is Held to a Strict Compliance With the Act.

This is a case involving the exercise of power by the Interstate Commerce Commission over intrastate rates, and in such a case, the Commission is held to a strictest compliance with the Interstate Commerce Act, and its orders must be supported by evidence and by findings, or they are arbitrary, illegal and void.

The Commission could not legally consider decisions in other cases decided by it, upon a different record, and the mere fact that in some other case the Commission reached a conclusion and rendered an order different from the present case does not supplant the rule that there must be evidence in the present case to support the contested orders.

Provision in sec. 14 of the Act to Regulate Com-

merce, declaring decisions and reports of Commission competent evidence in Federal and State courts, does not require that they be judicially noticed; nor does it relieve litigants from offering them in evidence, but its purpose is to save litigants expense of obtaining certified copies, and it does not otherwise change rules of evidence. (Davis *v.* Parrington, 281 Fed. 16, refusing to consider order of commission not presented in lower court; Great Western Oil Ref. & Pipe Line Co. *v.* Chicago, M. & St. P. R. Co., 275 Ill. 60, 113 N. E. 877, refusing to consider decisions of Interstate Commerce Commission not introduced in evidence; Fay *v.* Chicago, R. I. & P. R. Co., 186 Iowa 578, 173 N. W. 70, upholding refusal to take judicial notice of ruling of commission; Christy *v.* Wabash R. Co., 195 Mo. App. 240, 191 S. W. 245, upholding refusal to notice order designating safety appliances; Banaka *v.* Missouri Pac. R. Co., 193 Mo. App. 348, 186 S. W. 8, refusing to take judicial notice of order in reports of commission.)

In the case of *Clarence D. Robinson, Plff. in Err., v. Baltimore & Ohio Railroad Co.*, 222 U. S. 506, 56 L. Ed. 288, it is stated in the opinion of the court, delivered by Mr. *Justice Van Devanter,*

> "The next question to be considered is whether judicial notice should have been taken of the decision of the Commission in Glade Coal Co. *v.* Baltimore & O. R. Co., wherein, as it is said, the rate here in question was found to be unjustly discriminatory and the railroad company was directed to desist from its enforcement. The decision was rendered April 28,

1904, and authoritatively published in 10 Inters. Com. Rep. 226, but was not mentioned in the pleadings or in the agreed statement of facts. In the supreme court of appeals of the state it was contended that the decision should have been judicially noticed by the trial court, but the contention was rejected, and that ruling is now challenged as contravening the provision in sec. 14 of the act, which reads: 'The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be *competent evidence* of the reports and decisions of the Commission contained therein, in all courts of the United States and of the several States, without any further proof or authentication thereof.

"Undoubtedly, this provision makes the decisions of the Commission, as so published, admissible in evidence without other proof of their genuineness, but it does not require that they be judicially noticed, or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied upon. Its purpose is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions by authorizing the use of the published copies, but it does not otherwise change the rules of evidence. The ruling, therefore, was not in contravention of the statute."

The Commission in its present report points out that,

"It should here be noted that the proceedings involving the general southwestern re-

vision of rates have been reopened for further hearing upon the question of charging, and the amounts of, such arbitraries or allowances" (155 I. C. C. 265).

On page 36 of their brief, the carriers say:

"At pages 10 and 63 of their brief counsel say that in cases #16002 and 18702 of the Docket of the Interstate Commerce Commission none of the carriers presented any question as to the unreasonableness of the Louisiana rates. If the court will turn to answer in Docket 16002 of the Iberia and Vermilion Railroad Company, Lake Charles and Northern Railroad Company, Louisiana Western Railroad Company, and Morgan's Louisiana and Texas Railroad and Steamship Company beginning at page 311 of the record there will be found in the answer to Article VI of the complaint the express averment as to the Louisiana intrastate rates that

'Said rates were and are unreasonably low.'

See also the answer in the same proceeding of the Galveston, Harrisburg & San Antonio Railway Company, the Houston East & West Texas Railway Company, Houston & Shreveport Railroad Company and Texas & New Orleans Railroad Company (beginning at page 304 of the record) which says in Article 7 thereof:

'For other and further answer herein, defendants adopt and make their own the answer of the Louisiana Western and Morgan's Louisiana & Texas Railroad & Steamship Company, as fully as if set out at length herein.'

See also the answer in the same proceeding of the Texas & Pacific Railway Company and

> Denison & Pacific Suburban Railway Company, found at pages 314 and 315 of the Record in which, though in less specific language, the Louisiana intrastate rates are certainly called into question."

On page 10 of our original brief, we state:

> "Nowhere is the authority of the Louisiana Commission, the validity of its orders prescribing intrastate rates on sand and gravel, or the reasonableness of such rates questioned by the railroads in their answers before the Commission," and

on page 63 of our brief, we say:

> "It is significant that none of the answers filed by the defendant carriers in these cases set up the unreasonableness of the Louisiana intrastate rates on sand and gravel, or showed by revenue evidence that such intrastate result in an undue burden upon interstate commerce, and their case is built entirely upon a disparity between interstate and intrastate rates."

The statements we have made are borne out by the record. The carriers make no denial of the charge that their case was "built upon a disparity between interstate and intrastate rates," and that none of their answers "showed by revenue evidence that such intrastate rates result in an undue burden upon interstate commerce."

Paragraph IV of the answer of the Iberia & Vermilion, Lake Charles & Northern, Louisiana Western, and Morgan's Louisiana & Texas Railroad (R. 312),

denies that "the interstate rates complained of are have been, or will be unduly prejudicial or disadvantageous to complainant, or unduly preferential or advantageous to his competitors or in violation of Sections 3 and 13 of the Interstate Commerce Act or otherwise" (R. 312).

After this specific denial that there was or is any undue prejudice or disadvantage to complainant, or undue preference or advantage of his competitors growing out of the rates as complained of (which included Louisiana intrastate rates), the answer makes reference to the action of the Louisiana Commission's orders, but later, in paragraph VI of its said answer, says:

> "Answering Article VI of said amending complaint, these defendants deny each and all the allegations thereof and specially deny that complainant is or has been subjected to the charges in transportation described which are or for the future will be other than the lawful rates shown on file with this commission, *and deny that the rates attacked* are, or for the future will be unjust or unreasonable or unduly prejudicial or unjustly discriminatory or in violation of sections 1, 3 or 13 of the Interstate Commerce Act, or otherwise." (R. 313.)

It is true, as stated by the counsel for the carriers, that the Galveston, Harrisburg & San Antonio, the Houston East & West Texas, Houston & Shreveport, Houston & Texas Central, and Texas & New Orleans Railroad Company, adopt as their answer and make their own the answer of the Louisiana Western and

Morgan's Louisiana & Texas R. R. & S. S. Co. (R. 305); but the first named companies also specifically deny in their answer the allegations of paragraph IV, V, VI, and VII of the complaint in No. 16002 (R. 305).

The said paragraphs of the complaint the allegations of which are specifically denied by the said defendants, attack specifically the Louisiana intrastate rates as subjecting the complainant to undue prejudice and disadvantage and his Louisiana competitors to preference and advantage as compared with the interstate rates applicable from the shipping point in Arkansas to points in western Louisiana (R. 383, 384).

The answer of the Texas & Pacific (R. 314, 315), does not set up the unreasonableness of the Louisiana intrastate rates, but says:

> "they admit that the intrastate rates in Louisiana referred to in said complaint are lower, mile for mile, than the interstate rates complained of therein, but aver that such intrastate rates were published by the carriers, including this defendant, under orders of the Louisiana Public Service Commission or of its predecessor, the Railroad Commission of Louisiana, or else that the Louisiana Public Service Commission has refused to permit them to advance such intrastate rates to the level of the interstate rates in question" (R. 315).

We feel fully justified from the answers referred to above in making the statement that

> "Nowhere is the authority of the Louisiana Commission, the validity or its orders prescribing intrastate rates, or the reasonableness of

such rates questioned by the railroads" (our brief page 10).

This is fortified by the fact that in their bill against the Louisiana Commission attacking Order No. 675 of the Louisiana Commission, the carriers do not attack the said order on the ground that it was beyond the power of the Louisiana Commission to make, or that it was unconstitutional or illegal. Their attack upon the State commission's order rested entirely upon the conflict between that order and the order of the Interstate Commerce Commission under review.

In the hearing before the Louisiana Commission, the carriers made no attack upon the unreasonableness of the Louisiana intrastate rates, but relied solely upon the order of the Federal Commission prescribing intrastate rates and ferry charges.

On page 38 of their brief the carriers say:

> "We are somewhat puzzled as to the statement at page 103 of the brief, that:
>
> 'After the case had been argued in Washington, the Commission added the discussion under "Intrastate Rates" in which it explains fully the position of the Louisiana Commission.'
>
> That is nothing in the record on which to base a suggestion that the report of the Commission was handed down in sections."

As the hearing was under the cooperative plan provided for in Section 13 (3), the Commission and representatives then had to confer as provided in the rules of the Commission governing joint hearings held under this section (3 Int. Com. Acts, Ann. 1832, 1833), in order

to determine whether the Federal and State commissions participating in the hearing could agree on a scale of interstate and intrastate rates. The result of such a conference is made known in the Commission's remarks under "Intrastate Rates" (R. 58).

The Commission plainly states that it is proceeding to establish intrastate rates in western Louisiana on the same basis as interstate rates, because the Louisiana Commission "has indicated its willingness to remove the undue prejudice and unjust discrimination found to exist in Nos. 16002 and 18702 by authorizing the establishment of rates from western Louisiana producing points to northern Louisiana destinations, covered by the findings in those cases, on the same basis as those herein approved" (R. 58, 59).

The Commission then says:

> "In view of this expression on behalf of the Louisiana Commission and also of the further fact that the intrastate rates within Louisiana covered by finding No. 5 are embraced within our findings and order hereinafter made in the general case, it is unnecessary at this time to enter a separate order under finding No. 5" (R. 59).

It will be noted that the Commission discusses all the evidence which it deemed worthy of consideration on pages 249 to 278 of the report. It concludes with a discussion of "Transportation and Traffic Conditions," "The Hoch-Smith Resolution," and "General Discussion and Conclusions." It then makes its findings "Upon consideration of all the evidence, facts, and circumstances of record",—not part, but all of

them. There are 7 specific findings. This would seem to have closed the case, because there was no reservation by the Commission in its Finding No. 5 (R. 57).

It was impossible, of course, for the Commission to make the statement concerning the expression of the Louisiana Commission until after it knew that the interstate rates it had decided to approve were acceptable to the State commissions, but not the Louisiana commission, and this could not have been known to anyone until after a conference, for certainly at the time of the argument no one could have known what the decision of the Commission, acting independently, or jointly with the State commission, was to be.

Appellants Are Not Attempting to Interfere with the Order as a Whole, But Only in so far as It Affects a Limited Territory.

No attack is made upon the orders of the Commission as a whole. The contest is limited only to that part of the orders which deal with the illegal exercise by the Commission of authority granted under section 13 (4) and 15a, by fixing intrastate rates in that portion of western Louisiana south of the territory where actual injurious discrimination against interstate commerce was found to exist. This practice is in accord with the rule announced in *Georgia Public Service Commission v. United States*, 283 U. S. 765, where the court, through Mr. *Justice Brandeis*, says:

> "Such specific order, if appropriate for review under the urgent deficiencies act, could be

> dealt with by the courts without interfering with the operation of the order as a whole or with the flexible administration processes by which it may from time to time be modified."

There are many intrastate rates between interior points in western Louisiana, which do not work a discrimination against interstate shippers and localities in any way. This applies to all of the territory south of the Vicksburg, Shreveport & Pacific Railway. The Commission was not justified in extending its order as to intrastate rates to include such points. As was said in the *Wisconsin Case, supra,*

> "Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case the saving clause by which exceptions are permitted cannot give validity to the order."

The statement in the answer of the Louisiana Public Service Commission quoted on page 9 of the carriers' brief, is not an admission that the carriers' revenues, as a whole, on both interstate and intrastate traffic will be affected to any such extent. It is true, the State of Louisiana would have had to pay more for the transportation of sand and gravel under the prescribed rates, than it would pay for such transportation under the municipal rates.

It is "net railway operating income", and a "fair return upon the aggregate value of the railway property of such carriers held for and used in the service

of transportation" which the Commission must, "in the exercise of its power to prescribe just and reasonable rates" under section 15a, determine before it can impose on intrastate traffic increased rates in order to remove an undue burden on interstate commerce in the exercise of its powers under section 13 (4).

Points Common to Both the Government's Brief and the Carriers' Brief.

The appellees in both cases cite the *Wisconsin case*, 257 U. S. 563, as authority for the order of the Commission in this case in so far as it fixes intrastate rates in western Louisiana. After quoting liberally from the *Wisconsin case*, the Government's counsel, on page 26 of their brief, say:

> "It cannot be doubted that the interstate rates which the Commission approved in this case were established at a level which merely sufficed to sustain their fair share of the transportation burden."

However, in the absence of findings under section 15*a* which both the carriers and the Government seem to admit are absent, and which the record shows were not made, it is impossible for the Commission or the court to determine whether interstate transportation was unjustly burdened.

The following fundamentals of the *Wisconsin case* and the case at bar establish beyond question that the *Wisconsin case* is no authority for the order entered by the Commission in this case as to western Louisiana intrastate rates, but demonstrates that the

prerequisites for superseding the State power as pointed out in that great case are absent here, viz:

The Wisconsin case was a general investigation by the Commission where the level of the State rates was the only issue.

The present case originated in two southern Arkansas complaints filed against the railroads alleging undue preference of shippers in western Louisiana and undue prejudice against shippers in southern Arkansas growing out of the relation of interstate and intrastate rates on sand, gravel, crushed stone and shells, and a general investigation instituted on the Commission's own motion under the Hoch-Smith Resolution.

The undue preference and prejudice complained of was found to exist only in northern Louisiana, but by a general order the Commission established intrastate rates for all of western Louisiana, including a ferry transfer charge for Mississippi River Crossings Vicksburg and south without evidence as to the cost of the service.

In the *Wisconsin case,* the Commission found that the intrastate passenger fares could be used to the border points of the State of Wisconsin, and combined with interstate fares beyond, could defeat all interstate through fares.

There is no finding, or evidence to support such a finding, that the Louisiana intrastate rates in western Louisiana on sand and gravel could be used so as to defeat any through rates, and thus reduce the carriers' interstate revenues.

In the *Wisconsin case,* there was a finding by the

Commission that the net income of the carriers would be reduced by the intrastate passenger fares.

There is no finding by the Commission in the present case that the *net income* of the carriers will be reduced by the Louisiana intrastate rates in western Louisiana or as to what their net income was.

In the *Wisconsin case* the Commission made a full investigation under section 15a and met all the requirements of that section with respect to all the carriers in the group which included the Wisconsin carriers as to value, and aggregate annual net railway operating income, as well as of the carriers within the State of Wisconsin.

In the present case there is no evidence or finding as to the aggregate value of the railway properties of the carriers in the territory involved, no finding as to the net railway operating income, no finding as to a fair return, no finding that the carriers were in need of additional revenues in order to maintain an adequate transportation system, both State and interstate, in the territory affected by the rates. On the contrary, however, the carriers all denied through representatives under oath that they were seeking additional revenues (except as to the Texas lines), and the Commission rejected their proposal. (See pages 110-113 of our original brief.)

In the *Wisconsin case* the court upheld the order of the Commission as to intrastate passenger fares because under its exercise of the new power conferred upon the Commission by section 13 (4) it had made findings under section 15a of the Act in the performance of its duty under the latter section.

In the present case there are no findings under section 15a, and no basis was laid in the evidence upon which such findings could be predicated. In fact, it nowhere appears that section 15a was either directly or indirectly involved, the Commission having relied entirely upon section 13 (4) and the Hoch-Smith Resolution.

In the *Wisconsin case*, "appropriate discretion" was left to the State authorities to deal with intrastate rates, by the "saving clause" which was contained in the order of the Commission.

In the present case there is no "saving" clause and no discretion to deal with intrastate rates is left to the State commission.

Conclusion.

We again submit that the equities in both cases are with the appellants, that the Commission has not met the requirements of the law which governs its actions in prescribing intrastate rates in western Louisiana south of the line of the Vicksburg, Shreveport & Pacific Railway, and that the decrees of the district court should be accordingly reversed.

Respectfully submitted,

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